United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-6013

To be argued by
SAMUEL GOTTLIEB

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

—v.—

LEONE BOSURGI and EMILIO BOSURGI, etc., CHEMICAL BANK, etc., and SOCIEDAD ANONIMA DE INVERSIONES COMERCIALES E INDUSTRIALES (SAICI) and BENEDICT GINSBERG, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court For the Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE SOCIEDAD ANONIMA DE INVERSIONES COMERCIALES E INDUSTRIALES (SAICI)

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3

TABLE OF CONTENTS

Cases Cited

Statute Cited

BRIEF FOR DEFENDANT-APPELLEE
SOCIEDAD ANONIMA DE INVERSIONES COMERCIALES E INDUSTRIALES (SAICI)

Statement

The opinion of Duffy, J., upon which summary judgment was granted, resulting in this appeal, is reported in United States v. Bosurgi, 389 F. Supp. 1088 (Feb. 25, 1975) and is set forth in appellant's Appendix (A 479-491)*; Judge Duffy amended his order of February 25, 1975 by an order dated April 22, 1975, which among other things specified:

> "B. There being no just reason for delay in the entry of judgment pursuant to Fed. R. Civ. P. 54(b) in favor of said defendants dismissing the complaint of the United States, the Clerk is directed to enter judgment dismissing on the merits and with prejudice the claims and complaint of the United States, and severing the action accordingly.
>
> C. Benedict Ginsberg will continue to hold the fund in escrow pursuant to the provisions of the March 18, 1971 order, to wit:
>
> 'That the said Benedict Ginsberg, Esq. have and hold the said certificates of deposit in escrow subject to and impressed with any and all liens of the United States of America, and subject to any further order of this Court which may be made with regard to the rights of the United States of America, and any other claimant to the said $215,000.'
>
> pending final resolution (including appeals) of all tax claims in this action." (A 495-6)

This appeal followed. (A 497-8)

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* "A" refers to appellant Government's Appendix. All emphasis supplied, unless otherwise noted.

THE CASE PRESENTED IN ITS TRUE FOCUS

It is readily demonstrable that the unchallengeable facts and proceedings when treated in proper and accurate focus justify the determination rendered below.

A

The genesis of the $215,000 fund against which the Government unsuccessfully and belatedly asserted its estate tax claim, allegedly stemming from the demise of Adriana Bosurgi

Pursuant to a written agreement, appellee Benedict Ginsberg was retained and in 1966 brought an action in the Supreme Court, New York County, on behalf of Leone and Emilio Bosurgi, against the CHEMICAL BANK (A 153, A 164-5, A 431-47), which action, as Mr. Ginsberg's affidavit indicates, was brought

> "to recover damages because of The Bank's conversion to its own use of 5,200 shares of stock owned by the Bosurgis and held by The Bank as custodians, and because of The Bank's fraud in inducing the Bosurgis to execute certain documents which it thought would serve to ratify their misconduct.
>
> The plaintiffs alleged in said action, among other things, that The Bank improperly and unauthorizedly used their stock as collateral for a loan to third parties, whom The Bank knew to be of questionable integrity and against whom there were unsatisfied judgments of record, and that the transaction resulted in a complete loss to my clients.
>
> The enormity of The Bank's misconduct is evident from the fact that its vice president, who handled the transaction, admitted on his deposition that the use of my clients' securities as collateral for the loan which The Bank made to said third parties was made without any authorization from my clients. The said bank vice president testified that he used my clients' securities as collateral, on

the oral statement of the borrower that my clients had approved it. The bank vice-president admitted that he had not verified the borrowers statements, in any manner whatever. After many complex and involved proceedings, motions and appeals, and after extensive depositions in New York City and in Rome, Italy, the case came on for trial before Mr. Justice Kapelman in Supreme Court, New York County." (A 269-70)

The complaint in the foregoing action contained no reference whatsoever to an Adriana Bosurgi, mother of the plaintiffs Bosurgi (A 431-47). None of the six causes of action therein alleged contained any factual references or any allegations that permissibly yield any inference or foundation for any conclusion that the wrongs for which redress was sought in any way involved their mother, either directly, indirectly or derivatively. In fact, as Mr. Ginsberg testified on his fee application ultimately fixed in that lawsuit to which further reference will be made, he "had no awareness of her existence" at that time (A 249). Moreover, and of paramount importance is the undisputed fact, as Mr. Ginsberg noted in his sworn affidavit, that:

> "there were no funds in existence when I instituted the action on behalf of Leone Bosurgi and Emilio Bosurgi against Chemical Bank. In fact, that action was predicated upon the fraudulent conduct of the Bank in inducing the Bosurgis to execute documents renouncing their claims, and it was the action for that fraud, which resulted in the settlement." (A 155)

Indeed, the Government's brief here acknowledges (p. 3) that the Bosurgi's New York Supreme Court action was

"based upon alleged mismanagement of the account by Chemical Bank, which reduced its value to zero", so that it is obvious there were no securities, funds or income for that matter, then in existence against or upon which any estate tax claim or any other tax claim involving the mother, Adriana Bosurgi, could have been asserted. The complaint of the Bosurgi brothers in the lawsuit instituted by Mr. Ginsberg did not seek an accounting against the Chemical Bank, but sought compensatory and punitive damages on the basis of the tortious conduct therein alleged (A 447).

The fund in suit of $215,000 came into being as a result of the settlement of the foregoing tort litigation. As aforesaid, after "many complex and involved proceedings, motions and appeals, and after extensive depositions in New York City and in Rome, Italy, the case came on for trial before Mr.Justice Kapelman in Supreme Court, New York County" on September 15, 1970 (A 269-70; A 448). After "an all day conference held before Mr. Justice Kapelman, a settlement was arrived at and a settlement stipulation dictated into the record", which provided, among other things, that the action was settled for the sum of $215,000" (A 270; A 449-50); the record shows:

> "The action is settled for the sum of $215,000.00, to be paid within ten days from the date hereof, upon the following terms and conditions:
> (1) Counterclaims are withdrawn, with prejudice.
> (2) Prior to payment, the plaintiffs shall deliver

to the defendant general releases running to the defendant and such of its employees or former employees as the defendant desires to be included in the releases, notification of such persons to be made by the attorneys for the defendant to the attorney for the plaintiff within seven days from the date hereof." (A 449)

It is noteworthy that general releases running to the defendant Bank were to be delivered by the plaintiffs Leone and Emilio Bosurgi. There is no mention whatsoever of Adriana Bosurgi. However, the stipulation did provide that:

"(3) The proceeds of the settlement are to be paid to Benedict Ginsberg, attorney for plaintiffs, and held by him in escrow pending determination of claims asserted by the Internal Revenue Service of the United States Government against the defendant arising out of their relationship as banker, depository or custodian of the funds of the plaintiffs or their late mother, Adrianna Bosurgi.

(4) Pending the determination of the aforesaid claims, the entire amount of the settlement, together with such interest or increment that may accrue thereon, shall be held in escrow in the form of certificates of deposit or bankers acceptances issued by and purchased or acquired through such bank or trust company in the Borough of Manhattan as the defendant may select, the selection to be made within five days from the date hereof." (A 449-50)

The stipulation further provided:

"In the event of any dispute or difference of opinion with respect to the terms hereof or the manner of effecting the same or the obligation of plaintiffs' attorney with respect to the escrow funds, such issue or issues shall be referred to Mr. Justice Kapelman for determination by him as an arbitrator, either upon affidavits or upon testimony, as he may deem appropriate, with the decision which he may render on such issues to be deemed the

> decision of an arbitrator, it being understood that this method is being selected so that the determination so made shall be final and non-appealable." (A 450-1)

Respective counsel placed their approval of the stipulation of settlement on the record (A 451-2).

The Government's brief admits (pp. 3-4) that the Bosurgi brothers' New York Supreme Court action "seeking a money judgment in excess of $1,000,000.00 based upon the alleged mismanagement of the account by Chemical Bank which reduced its value to zero" was "tentatively settled in 1970 upon the Chemical Bank's promise to pay $215,000.00 to the Bosurgis." The Government's brief also correctly states that although the settlement stipulation dictated into the record before Mr. Justice Kapelman on September 15, 1970 (A 449-50; pp. 4-6, supra) provided for "a formal written stipulation, no written stipulation was ever effectuated and Chemical Bank did not pay the $215,000 to Ginsberg" (Gov't's br., p. 6). Indeed, "[t]he Bank refused to comply with the provisions of the stipulation" and Ginsberg "was required to make an application to the court in which the action had been instituted for an order directing The Bank to pay the $215,000.00" to him (A 270). Before that application was determined, the Government brought its action and

proceeding in the Federal District Court "to direct payment of the proceeds of the said settlement in a manner different from that provided in the stipulation of settlement." Judge Bonsal denied that application and ordered the funds to be turned over to Ginsberg as escrowee (A 271); see order of Bonsal, J., A 33-4). Ginsberg had agreed to hold the money "in escrow pending determination of claims asserted" by the IRS (A 55) and Judge Bonsal's order provided for the purchase of certificates of deposit which Ginsberg was to hold subject to such further order "which may be made with regard to the rights of the United States of America or any other claimant to the said $215,000.00" (A 271). The Bank's appeal from Judge Bonsal's order was unanimously affirmed here on April 21, 1971 (A 271; A 2; A 44).

It must be emphasized that at the time Mr. Ginsberg instituted the New York State Supreme Court action against the Bank in 1966, no tax claim or tax lien of any kind had been asserted by the Government. And as already noted and moreover, of controlling importance, it is not and cannot be disputed that Mr. Ginsberg as aforesaid, then "had no awareness of her [Adriana Bosurgi's] existence" until "the settlement was made" (A 249). Indeed, it was not until March 2, 1971 (the settlement before Mr. Justice Kapelman as aforesaid was made on September 15, 1970 [A 448-51]) that the Government "made four jeopardy

assessments arising out of the [alleged] estate tax liability of the Estate of Adriana Bosurgi" (A 10-11). The protracted and burdensome pretrial proceedings and depositions carried on by Mr. Ginsberg both here and in Rome, in prosecuting the tort claims and causes of action levelled against the Bank, were for and on behalf of the Bosurgis personally; their complaint in not one of its six causes of action, either directly, indirectly or derivatively involved their mother Adriana Bosurgi or her estate (A 431-47). Indeed, there was no reference in the complaint to the "custodian account" in the name of Adriana Bosurgi (A 431-47), in which account it should be noted in passing that Leone and Emilio Bosurgi each had absolute and unlimited power of attorney to dispose of the securities therein in any way, shape or manner (A 292).

The settlement after an all day conference before Mr. Justice Kapelman, in the sum of $215,000.00, was made with the Bosurgis and in consideration of their personal general releases; it did not embrace or include, or for that matter involve any surrender of the rights, if any, of Adriana Bosurgi or her estate (A 448-51). Moreover, as we must emphasize, and as the Government's brief admits, the stipulation placed upon the record before Mr. Justice Kapelman "contemplated a further written stipulation which was never

executed and therefore the state court action was still 'pending'" (Gov't's br., p. 11). Concededly then, no settlement at such time had been finally concluded; there was no final adjudication awarding the settlement proceeds to the Bosurgis. If the settlement were aborted for any reason at that time, it would necessarily follow that the settlement proceeds would have had to be returned to the Bank, from whose general funds they were derived, since the custodian account had concededly long before then been reduced "to zero" by the Bank's tortious conduct (Gov't's br., p. 3).

B

The facts and circumstances that made it mandatory for SAICI to establish its right to the settlement proceeds in the Supreme Court, New York County, where the Bosurgi action was still pending and undetermined.

The action and proceedings before Mr. Justice Kapelman in the New York Supreme Court were still pending in the foregoing incomplete posture when our firm was retained to bring suit for SAICI, claiming ownership of the proceeds (A 222); on June 2, 1971, before service of process, Mr. Ginsberg was so advised and he in turn promptly notified Mr. Justice Kapelman (A 22-3). Mr. Ginsberg in

his letter to Justice Kapelman stated:

> "It is now almost nine months since the case was settled in your Honor's Chambers.
> May I therefore respectfully request that your Honor see counsel, in your capacity as arbitrator, for the purpose of fixing my fee and directing payment, subject to the order of the Federal Court as to the disbursing of the sum which I hold in escrow." (A 224)

A conference was then held on June 23, 1971, before Mr. Justice Kapelman, at which were present Michael I. Saltzman, Assistant United States Attorney, John A. Lucido, of the Cravath law firm, representing Chemical and Benedict Ginsberg (A 224). On the following day, June 24, 1971, we sent a communication to Mr. Ginsberg, a copy of which was hand delivered to all counsel as well as to Justice Kapelman, which noted:

> "As requested at the conference held yesterday afternoon before Mr. Justice Kapelman this letter is being sent to all counsel and to the Court stating the position of our client, S.A.I.C.I." (A 224)

The foregoing letter quoted from our earlier one of June 2, 1971, in which we had urged that no beneficial purpose could be served "by commencing the [SAICI] action through attachment with the concomitant needless and impractical expense." We requested that service of the summons and complaint be accepted and that "a simple stipulation between us governing the disposition of the funds in escrow along similar lines to the foregoing order [Judge Bonsal's order] can effectively serve everyone's purpose yet at the same time avoid needless expense and proceedings."

The letter likewise specifically referred to the following:

> "Subsequently on June 16, 1971 Michael I. Saltzman, Esq., Assistant United States Attorney, in a telephone talk with me asked that I send him a copy of the summons and complaint, our proposed order of attachment and the affidavits and exhibits annexed thereto in the aforementioned lawsuit instituted by this office. At yesterday's conference, I stated that copies of those papers would likewise be furnished to counsel for the Chemical Bank which will be done together with a copy of this communication." (A 225)

The communication then continued:

> "It is our position:
>
> 1. That the law suit we have begun and in which there is presented substantial documentary proof in support of the issue raised by plaintiff, claiming title to the funds here involved, should be consolidated or in any event heard and considered concurrently with the proceedings now pending before Mr. Justice Kapelman in the first of the above entitled actions.
>
> 2. Unless the issue raised as to the title of these funds is initially and promptly determined we contend there will exist no valid or legal basis for Mr. Justice Kapelman to make a complete and final determination of this matter.
>
> 3. Our request for a consent to consolidation or, in the alternative, for a concurrent consideration of the issue raised as to title with the pending proceedings is primarily designed to enable the most expeditious disposition of the determination of the conflicting rights and interests." (A 225-6)

With respect to Mr. Ginsberg's insistence that his legal fees be fixed without further delay, we stated:

> "You claim that your legal fee is predicated upon a written retainer with your client which you advised Mr. Justice Kapelman at the conference, entitled you to $17,000. plus 40% of the amount recovered by way of settlement. In response to the Court's statement that a retainer agreement is subject to judicial review and evaluation,

your position was that that may be done at the client's instance and that here there was no objection by your client. However, your written retainer arrangement made with your client, the Bosurgis, is not binding upon our client. I, of course, recognize that we have no standing before Mr. Justice Kapelman in those proceedings unless our client's claim of title is first established. It was for that very reason that consolidation or concurrent hearing was and is proposed by me to expedite matters." (A 226-7)

We challenged the validity of the settlement stipulation in so far as it designated Mr. Justice Kapelman as an arbitrator:

"6. As I advised you in the foregoing conference, [before Justice Kapelman] it is our position that the stipulation placed upon the record in your lawsuit on September 15, 1970 by you and the Cravath firm, to the effect that any dispute, difference of opinion or issue pertaining to the settlement made (which includes the issue as to legal fees) is to be determined by Mr. Justice Kapelman 'as an arbitrator' is invalid and erroneous in so providing." (A 228)

And we suggested:

"Accordingly, I repeat, on behalf of the client we represent, that correction be made as to the term 'arbitrator' so that Mr. Justice Kapelman may dispose of these issues, as was clearly intended, in quick and summary fashion either by conventional hearing or under Simplified Procedure. It is unnecessary, therefore, in this connection to do no more than cite the cases indicating that a Supreme Court Judge may not serve as 'arbitrator' even upon the consent of counsel and the clients (Matter of Bernard Macfadden v. Felix C. Benvenga, 290 N Y 568, Matter of Jacobs v. Steinbrink, 242 App Div 197, 1466 Realty Co. v. Baum, 38 Misc 2d 209)." (A 228)

Our legal position as to jurisdiction and venue was likewise set forth:

"7. Finally, it must be emphasized here, as I did at the conference, that the course suggested in no respect is in conflict or contravenes the order of Judge Bonsal. I again direct attention to Vernitron Corp. et al. v. Benjamin, 440 F. 2d 105 (2 Cir. Mar. 5, 1971). That authority renders it clear beyond dispute that the question of title to these funds raised by our client can only be decided in the proceeding pending in our state courts. Manifestly, Judge Bonsal cannot undertake to decide your claim as to legal fees and your rights asserted on the basis of your retainer with the Bosurgis which my client, as I asserted at the conference and repeat here, has the right to challenge as the owner of the funds held by you in escrow. Of course, if the issue as to title is resolved in our client's favor it will dispose of the tax claim asserted by the government against the Bosurgis. However, that, under the decision in Vernitron Corp., does not furnish any basis for interposition or restraint as to these state court proceedings because, as the federal court of appeals held:

> '[i]t is not sufficient to show that the matter properly before a state court embraces issues within the compass of the federal suit, even if the federal court has exclusive jurisdiction over its case.' (p. 108)

Moreover, '[t]here is no reason why the state court cannot or should not determine issues of fact and state law relevant thereto as they come up in the state litigation', and of controlling importance is the further ruling of the court of appeals that '[t]he subsequent effect of collateral estoppel, far from requiring the federal court to stay proceedings in the state court, is a result which should be welcomed to avoid the task of reconsidering issues which have already been settled by another competent tribunal.' (p. 108)" (A 229)

The letter concluded:

"On the basis of the foregoing, I urge that this office be immediately advised as to whether the requested consent for the consolidation or for a concurrent hearing on the issue of title in the pending proceedings will be forthcoming. If not, I propose to move for appropriate relief to that end as heretofore indicated." (A 230)

No consent was forthcoming, as above requested, either from Mr. Ginsberg, the Government or the Bank counsel and accordingly, on October 12, 1971, a motion was made in the SAICI case, returnable November 4, 1971:

"that an order be made and entered herein consolidating the above-entitled action with the action in this Court entitled Leone Bosurgi and Emilio Bosurgi, Plaintiffs, against Chemical Bank New York Trust Company, Defendant, Index No. 7939/66, or directing that concurrent consideration be given as to the issue herein raised with respect to title of the fund here involved with matters now pending before Mr. Justice KAPELMAN in the foregoing action pertaining to and involving said fund and the claim of Benedict Ginsberg, Esq. for an award of counsel fees to be paid out of said fund and directing that summary judgment be granted in favor of plaintiff above named against the defendants above named pursuant to Rule 3212 of the Civil Practice Law and Rules, upon the ground that there are no triable issues of fact and that there are no defenses to plaintiff's cause of action and that plaintiff is entitled to summary judgment as a matter of law," (A 230-1)

Mr. Ginsberg, who appeared in the action after we advised him it would be commenced "through attachment with the concomitant needless and impractical expense involved" in the cost of the undertaking, Sheriff's poundage fees, etc. (A 223-4) served a

cross-motion:

> "for an order fixing the fee of the defendant Benedict Ginsberg and authorizing him to retain out of the monies now held by him in escrow the sum of $78,800.19, plus 40% of the interest and increment accruing on the sum of $215,000.00 heretofore delivered to him in escrow and subject to the order of the United States District Court for the Southern District of New York," (A 231).

Copies of our motion papers were also served on the Cravath firm and Assistant United States Attorney Mr. Saltzman (A 231). The motion appeared on the calendar in the New York Supreme Court Motion Term held by Mr. Justice Silverman, to whom we made clear by letter dated November 5, 1971, why we considered it mandatory that the motion be referred to Mr. Justice Kapelman (A 231-2). And on November 24, 1971, we wrote Assistant United States Attorney Saltzman; the Court will note our persistent effort to resolve the procedural impasse by some sensible stipulation:

> "You evidently prefer that the matter be disposed of before Judge Bonsal. I think it fair to say from the beginning my position has been, as reflected in my letter to Judge Silverman, that I saw no need whatsoever on my part to indicate any preference as to Judge Bonsal, Judge Silverman or Judge Kapelman. In the intervening months you and all other counsel were certainly in a position to bring the issue as to venue and jurisdiction to a head by making some appropriate application--but none of you did so. You are now in a position, if you so desire, to make an application to throw the matter and the responsibility of deciding the issue as to venue and jurisdiction in the lap of Judge Bonsal; or, as I have suggested from the outset, try to resolve the matter by a sensible stipulation." (A 209).

As Judge Duffy inc vely noted on a prior application in this case: "The United States of America has effectively refused to do anything about the State Court action" (A 197; A 276). Suffice it to say that no stipulation could be achieved and the motions were referred by Mr. Justice Silverman to Mr. Justice Kapelman for determination on their merits (A 232). The Bosurgi case admittedly was then "still pending"* and undetermined before Mr. Justice Kapelman (Gov't's br., p. 11); admittedly, the case had been "tentatively settled" (Gov't's br., pp. 3, 6). There had been no consummation of the settlement by final order or judgment directing disposition of the proceeds for which the action had concededly been "tentatively settled." Moreover, Mr. Ginsberg was importuning Justice Kapelman to direct payment of his fees and disbursements in accordance with his written retainer (pp. 9-10, supra; A 224).

On behalf of SAICI, we were claiming the settlement proceeds and also opposing the granting of a counsel fee as fixed by the written retainer with Mr. Ginsberg, which we contended was not binding upon SAICI (pp. 11-12, supra; A 226-7).

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* The Government's brief (p. 11) refers to Judge Lasker's decision that the State Court Bosurgi case "was pending in New York Supreme Court at the time of service of process" by the Chemical Bank in this action (A 64-66).

Manifestly, SAICI's action and the proceedings in the foregoing setting could only have been brought in the New York State Supreme Court before Mr. Justice Kapelman, since the admittedly tentative settlement was arrived at before him and the settlement proceeds in the action which admittedly was then still pending had not been disposed of by final order or judgment. Moreover, as the Government's brief acknowledges (p. 4) "[t]he United States does not contest the lien priority of Mr. Ginsberg, but only the amount thereof." We had taken that position on June 24, 1971, even before the SAICI suit was begun (A 224-28), when we challenged the validity of the settlement provision placed on the record before Mr. Justice Kapelman, designating him as an "arbitrator" (A 224), in which capacity Mr. Ginsberg wanted him to act for the purpose of fixing his fee (p. 10, supra; A 224)* The New York State Supreme Court, it is thus manifest and will be further demonstrated, was the only judicial tribunal available to SAICI for the determination of these matters which were patently not cognizable in the Federal Court, nor did any basis exist upon which the Federal Court could assume jurisdiction thereof. Understandably, no motion for removal was made.

The Government's brief disingenuously argues (pp. 13-14) that the "most remarkable aspects of this [SAICI] complaint was that venue was laid in the Supreme Court, New York County"

* We were ultimately successful at the Appellate Division in sustaining SAICI's position that it was not bound by the written retainer which Mr. Ginsberg urged fixed his fee (Sociedad [SAICI] etc. v. Bosurgi, et al., 43 AD 2d 519-20).

and that it is "unclear why SAICI laid venue in the state court". We respectfully inquire how could a federal court undertake to finalize the admittedly "tentative settlement" and the admittedly "still pending" and undetermined action before State Supreme Court Justice Kapelman?

On the other hand, as already indicated (pp. 10-16), supra), as far back as June 23, 1971, Mr. Saltzman was invited to appear, and he claims (Gov't's br., p. 15) that he "was present as a courtesy to Mr. Justice Kapelman". And on November 5, 1971, at the time our application for summary judgment was returnable before State Supreme Court Justice Silverman, we wrote Mr. Saltzman asking him "to indicate how it is possible to have an effective and expeditious and complete disposition in any other court or before any other judge" and "upon what basis federal jurisdiction can be stipulated on an issue of title purely cognizable in the state court" and more important, that "we would be better off by endeavoring to reach a stipulation as to the most effective procedural course to be pursued" concerning which "all counsel up until the present time have been completely silent" (A 232). As far back as June 24, 1971, Mr. Justice Kapelman was advised that the summons and complaint in the SAICI case, the proposed order of attachment, the affidavits and all of the documentary

exhibits had been furnished to Mr. Saltzman (A 225). As will now be demonstrated, there was more than a courtesy appearance by Government counsel in the SAICI case.

C

> At the Government's urging, Mr. Justice Kapelman, whose determination was reversed at the Appellate Division (Sociedad [SAICI] etc. v. Bosurgi, et al., 43 AD 2d 519-20), denied SAICI's motion and Ginsberg's cross-motion for summary judgment.

The Government below (A 344) and apparently in this Court, assumes that the SAICI case depended upon in rem jurisdiction and this upon the erroneous belief that the action was commenced through attachment of the settlement proceeds (A 318-9; Gov't's br., p. 14). There was no attachment of the settlement proceeds. There was a general appearance and an answer on behalf of the Bosurgis in the SAICI action (A 361-2; A 409-10)*. Government counsel, as already noted, refused either by stipulation or otherwise, to enter a formal appearance in the state court actions or proceedings, although there was no hesitancy on the part of Government counsel in urging Mr. Justice Kapelman to deny the relief sought on the respective applications aforesaid; the motion papers in each were specifically directed to and served upon the United States Attorney for the Southern District of New York (A 374-5; A 457-8). Months prior thereto, as already noted, Mr. Saltzman, Assistant

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* See Henderson v. Henderson, 247 N.Y. 428, 434; CPLR § 320.

United States Attorney, had a copy of the summons and complaint in the SAICI case, the proposed order of attachment, the affidavits and all the identical exhibits relied on in the subsequent summary judgment application likewise served upon him as aforesaid (A 225, A 374). SAICI's application for consolidation of its case with the Bosurgi case and for summary judgment was opposed by everybody. Mr. Ginsberg, who although admitting that his clients, the Bosurgis, acknowledged the authenticity of the exhibits upon which SAICI's case and application for summary judgment were based (A 459-60) did "object to that portion of the motion which seeks an order directing me [Mr. Ginsberg] to turn over the escrow money to plaintiff" (A 460); quoting further from his affidavit:

> "The basis of my objection is that I have a lien on the moneys, for my services. The escrow money came into existence solely by reason of my efforts in the action by the Bosurgis against Chemical Bank to which reference is made in the moving affidavit. I am confident that neither plaintiff's attorneys, nor the attorneys for Chemical Bank, nor the U. S. Attorney for the Southern District, will dispute this assertion." (A 460)

Mr. Ginsberg did not even consent to consolidation. He urged that his cross-motion be granted and his fee fixed in accordance with his written retainer (A 463). The Chemical Bank opposed the motion to consolidate and likewise opposed

Mr. Ginsberg's cross-motion (A 467, A 472-3) and as to SAICI's summary judgment application, the Bank stated:

> "15. The Bank takes no position on the merits of plaintiff's summary judgment motion." (A 473)

The Government, in addition to its "courtesy" appearance before Mr. Justice Kapelman (p. 18, supra), communicated its opposition to the pending applications without a formal appearance and undertook to pursue the same procedure, as will shortly appear, at the Appellate Division (A 190-2; A 322-3; A 372). Justice Kapelman's opinion, denying both SAICI's and Ginsberg's applications, reflects the Government's opposition:

> "The Government has indicated by letter dated October 28, 1971, that it intends to amend the complaint to add Sociedad and Mr. Ginsberg as defendants in the federal action, and bring them into said action.
>
> It appears evident that this motion is to force the expeditious disposition of the determination of conflicting interests.
>
> The Government alleges without evidentiary proof that the Bosurgi Brothers control Sociedad. The Government maintains that the most expeditious manner of disposing of the issues is to litigate the title to the fund in the Federal Court." (A 372)

Appeals were promptly taken from Justice Kapelman's order, entered August 21, 1972; notices of appeal were addressed to and served on Government counsel (A 238; A 363-9).

In the endeavor to cut through what has been described as the procedural thicket that had developed, counsel for SAICI before prosecuting the appeal from the adverse determination of Justice Kapelman, held a conference with Leon Hart, Esq., United States Attorney in charge of the matter at the Appellate Division of the Internal Revenue Service (A 234); the conference was set up by the office of Boris Kostelanetz, Esq., who previously had handled the matter with IRS (A 234).

In the lengthy conference that ensued on October 20, 1972, reference was made to the documentary proof that had been presented on the aforementioned motion for summary judgment; that very day we forwarded to United States counsel Hart "two copies of our motion for summary judgment in the New York Supreme Court and copies of the pleadings in the proceedings in the United States District Court" (A 234). We asked that the enclosures be reviewed and whether a further meeting was advisable (A 235).

On December 15, 1972 we again communicated with Mr. Hart and referred to our earlier conference, in which he was informed of "our appeal to the Appellate Division" and that we had deferred "perfecting the appeal pending your review and reaction to the papers that you requested

copies of, which we rushed to your office that very day"; having heard nothing, we were "left with no other recourse but to proceed with the appeal." (A 237-8).

No application was made by Government counsel for a stay of the proceedings before Mr. Justice Kapelman or the Appellate Division. On the contrary, David P. Land, Assistant United States Attorney, in a three-page letter dated September 14, 1973, to the Justices of the Appellate Division, asserted he was "writing as amicus to the court" and did "respectfully urge that the orders appealed from be affirmed", which was returned by the Appellate Division with the advice that counsel could "apply for leave to file a brief amicus curiae on notice to the parties", which was not done (A 239; A 190-2).

The foregoing appeal was perfected and argued on September 16, 1972; the order denying SAICI's motion "for an order of consolidation or concurrent consideration and for summary judgment" was "unanimously reversed on the law". The adverse determination as to Mr. Ginsberg was "unanimously modified on the law and the facts and the cross-motion granted only to the extent of a remand for a hearing to determine the fixation of fees" (A 239-40; 43 AD 2d 519). Before treating with the legal effect of the per curiam opinion rendered by the Appellate Division and the judgment entered pursuant

thereto (A 239-40; A 258-62), we respectfully direct attention to the fact that pursuant to the order of reversal, a notice for "a hearing to determine the fixation of fees" of Mr. Ginsberg was duly served upon all counsel, including the United States Attorney (A 244) the latter did not appear (A 259). At the conclusion of the hearing, at which testimony was taken and as a result of a further conference with Justice Kapelman,* an accord was ultimately reached substantially modifying the retainer arrangement (A 245-8).

The final judgment of Mr. Justice Kapelman, entered on December 14, 1973 pursuant to the aforesaid determination of the Appellate Division and subsequent to the hearing "on the issue concerning said legal fees of Mr. Ginsberg" (A 259), provided:

> "ORDERED, ADJUDGED and DECREED, that the aforesaid fund resulting from said settlement in the sum of $215,000.00 and the securities representing the same, plus accrued interest thereon, now being held in escrow by said BENEDICT GINSBERG, ESQ., hereby adjudged and decreed to belong to and title to which vests in plaintiff SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES, is subject to a retaining lien of said BENEDICT GINSBERG, ESQ., for the legal value of his services and reasonable disbursements incurred in connection with the aforesaid lawsuit and the settlement thereof as fixed pursuant to stipulation placed upon the

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* Quoting Friendly, J., in Phillips, Nizer, etc. v. Rosenstiel, 490 F. 2d 509, 2 Cir. 1973, Mr. Justice Kapelman was "in a far better position to determine reasonable compensation" for Mr. Ginsberg "than another tribunal which comes to the case cold." (pp. 518-19)

> record at the aforesaid hearing by and between counsel for SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES and BENEDICT GINSBERG, Esq., as follows: Said BENEDICT GINSBERG, Esq., shall be entitled to 35% of the settlement sum of $215,000.00 less his retainer of $17,500.00 and less his actual disbursements in the sum of $2,984.65, namely, $68,080.37 plus 35% of all accrued interest to the date of payment and in addition thereto shall be entitled to receive that part of his said actual disbursements remaining unreimbursed in the sum of $994.05." (A 261-2)

The foregoing judgment is in full force and effect and non-appealable.

P O I N T S

I. JUDGE DUFFY CORRECTLY GAVE "PROPER REGARD" TO THE FINAL JUDGMENT OF Mr. JUSTICE KAPELMAN IN THE CONSOLIDATED STATE COURT ACTION WHICH DECREED THAT THE SETTLEMENT PROCEEDS BELONGED TO SAICI, SUBJECT TO THE ATTORNEY'S LIEN FOR THE LEGAL FEES OF Mr. GINSBERG, WHOSE SERVICES PRODUCED THE SETTLEMENT.

THIS RECORD PRESENTS NO BASIS EITHER IN FACT OR LAW FOR HOLDING THAT THE SETTLEMENT PROCEEDS OF $215,000.00 REPRESENTED BY THE SECURITIES, CURRENTLY IN ESCROW, EITHER WERE THE PROPERTY OF ADRIANA BOSURGI OR INCLUDABLE IN HER ESTATE AND SUBJECT TO AN ESTATE TAX CLAIM OR LIEN.

At the time the Bosurgi case was begun by Mr. Ginsberg in May of 1966 (A 431-47), the custodian account at the Chemical Bank, as we have shown, admittedly had been reduced "to zero" (pp. 3-4, supra). Moreover, Mr. Ginsberg "had no awareness of her [Adriana Bosurgi's] existence" at that time; he learned of her existence after the settlement with the Bank was made and when the Government threatened and then brought suit for the estate tax claim after the demise of Adriana, mother of the Bosurgis (A 249). At the time of the Bosurgi suit there were no funds or securities of any kind in the custodian account, nor was there any custodian account extant (A 155). The Bosurgi complaint was grounded purely in tort and sought only money

damages, both compensatory and punitive, against the Bank; each of the six causes of action alleged tortious conduct on the part of the Bank; none was for an accounting or for the recovery of any securities or property (A 431-47). As heretofore indicated, the tortious conduct alleged against the Bank involved 5,200 shares of stock, ownership of which was asserted by the Bosurgis (p. 2, supra). Adriana Bosurgi died on March 27, 1963 (A 268), as aforesaid, three years before Mr. Ginsberg instituted the Bosurgi case in the New York Supreme Court. Adriana's sons, Leone and Emilio Bosurgi, as we have indicated, each had absolute and unlimited power of attorney to dispose of the securities in the custodian account at the Chemical Bank (p. 8, supra; A 292). Such powers, consistent with ownership, were not affected nor terminated by the death of Adriana, since "coupled with an interest*" - and this whether the title to the 5,200 share block of stock involved allegedly vested in Leone and Emilio Bosurgi personally or in a representative capacity (p. 2, supra; A 269-70).

Moreover, of controlling importance is the indisputable fact that the settlement proceeds were not assets, either directly or indirectly derived from the estate of Adriana Bosurgi. The settlement payment evolved solely from

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* See Eisel v. Miller, 84 F 2d 174, 178, 8 Cir 1936; Wilson v. Snow, 228 US 217, 33 S. Ct. 487, 57 L. Ed. 807.

the personal lawsuit prosecuted by Leone and Emilio Bosurgi. It was a settlement arrived at in good faith, in a bitterly contested adversary proceeding (pp. 2-6, supra; A 269-70; A 155; A 449-52). The settlement so agreed upon was per se valid, without reference to the validity of the original claims of the parties. Nor will a court look behind the compromise in order to determine or evaluate the validity thereof. Indeed, even though the claims be without validity and incapable of enforcement, or for that matter even though the amount of settlement exceeds the sum actually found to be due, such settlement in the absence of fraud is nonetheless judicially enforced. It is settled law that a good faith compromise of a bona fide claim is a valid consideration that safeguards a negotiated settlement from subsequent attack (Ransburg Electro-Coating Corp. v. Spiller & Spiller, Inc., 489 F. 2d 974, 977-8, 7 Cir. 1973; Yonkers Fur Dressing Co. v. Royal Ins. Co., 247 N.Y. 435, 445-6 (1928); Wishnick v. Preserves & Honey, Inc., 272 N.Y. 252, 258-9 (1936); Post v. Thomas, 212 N.Y. 264, 273-4 (1914); Wallace v. McCabe, 41 Misc. 2d 483, 484-5).

The record further establishes beyond challenge that the funds which ultimately evolved from the settlement before Mr. Justice Kapelman did not represent assets or funds belonging to or derived from Adriana Bosurgi, which are includable in her estate.

(a) No rights of Adriana Bosurgi's Estate were compromised or impaired. No releases of any estate claims or rights were given or provided for in the settlement agreement before Mr. Justice Kapelman*

SAICI's claim and action for the settlement proceeds stemmed from the allegations and facts supported by the documentary proof contained in the record before the Appellate Division upon which summary judgment was granted to SAICI in the state court action as aforesaid; the full record on appeal is included in the Government's appendix (A 358-474). The Court held that:

> "The documentary evidence submitted on the motion, conceded to be 'genuine and authentic', conclusively demonstrates that the fund in question represented the proceeds of a trust established in writing, December 10, 1954, between plaintiff and the Bosurgi defendants and their mother, Adriana Bosurgi; and that it belongs to plaintiff [SAICI], for whom the defendants, Bosurgi, have been simply holding it in a fiduciary and custodial capacity. Thus, there is no genuine issue of fact in respect of title thereto. The posture of the Chemical Bank is not realistic. We perceive no development whereby the bank could possibly be prejudiced by this grant of summary judgment. Nor can the pending Federal actions and proceedings present any bar to the entry of summary judgment in favor of the plaintiff, as the tax liens, if valid, are not affected. In any event, we find no impediment to this court's determining an issue of fact competently before it, regardless of peripheral Federal questions. (Venitron Corp. v. Benjamin, 440 F. 2d 105, cert. den., 402 U.S. 987.) And it is clearly so when the plaintiff herein has not been stayed by a Federal court order." (43 AD 2d at p. 520; A 194).

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* See pp. 4-6, supra; A 449-51.

The record before the Appellate Division established as we successfully demonstrated in that Court, that SAICI, a Uruguayan company, entered into a joint venture with W. Sanderson & Sons of Milan, Italy, to finance, build and establish a citrus bi-products plant for Sanderson in Concordia, Argentina* (A 377; A 413). For "commercial, competitive reasons," and to maintain secrecy which SAICI determined necessary to foster and promote its enterprise, SAICI agreed with Adriana Bosurgi and her sons Leone Bosurgi and Emilio Bosurgi, all Italian nationals, to channel repayment of SAICI's loans for the Concordia enterprise through the deposit of dollars in an account in the Bosurgi name at a designated New York bank (A 377; A 413-14). On December 10, 1954, SAICI and Adriana Bosurgi, Leone Bosurgi and Emilio Bosurgi entered into a written trust agreement (A 412-14), which provided:

> "According to a plan agreed upon by the parties hereto, repayment to the financing company shall take place gradually by means of deposits in dollars made in New York, into a New York bank to be indicated by the financing group, or by means of interest-bearing investments according to arrangements to be made with Mrs. Bosurgi, to whom the fiduciary administration of the deposits herein shall be entrusted; it can also be held under her own name, provided she commits herself to give full account for it, when so requested.
>
> Yearly, or at periods of time to be set by mutual consent, the parties hereto shall determine profits, amortization amounts and interests, and shall establish a balance to be kept freely at Mrs. Bosurgi's disposal, registered in her name or in the name of her sons, in fiduciary administration for S.A.I.C.I." (A 414).

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* Argentina was given to the Bank as the "legal residence" of the Bosurgi brothers (A 300-2).

The Bank was designated as depository for SAICI's funds pursuant to the foregoing agreement (A 395); an account was established in the names of "Adriana Bosurgi and/or Leone Bosurgi and Emilio Bosurgi" for the deposit and custody of SAICI's funds in accordance with the fiduciary relationship set up by the agreement of December 10, 1954 (A 396).

The trust relation and custodial capacity in which the Bosurgis held SAICI's funds in the said Chemical Bank account was affirmed in writing at various times. On January 26, 1955, Adriana Bosurgi and her sons Leone Bosurgi and Emilio Bosurgi wrote to plaintiff, stating in part:

> "We consider the agreement fully effective and valid in every respect according to the draft of December 10, inst., also before receipt of the final draft." (A 416-17).

On January 10, 1959 Adriana Bosurgi, with confirmation by Leone and Emilio Bosurgi, wrote SAICI:

> "We hereby advise you that the accounts with your shareholders were settled up to and including December 31, 1958, and therefore the cash or securities amount, in conformity with the list submitted to the same and marked with their initials, have allowed for the closing of the balance relative to the Sanderson Argentina and W. Sanderson, Milano-Messina (Italia), administrations.
>
> It is hereby confirmed that the undersigned remains the trustee and will administer in her own name, but on your behalf, the assets existing in New York relative to the final balance, as it was agreed upon." (A 418-19).

Again, on January 25, 1961, Adriana, Leone and Emilio Bosurgi wrote SAICI:

> "We advise you hereby that accounts were settled up to and including December 31, 1960, and after settling the debit and credit balance, we determined the amount which remains at your disposal according to the reckonings we agreed upon, and which should be retained reservedly by both parties.
>
> It is understood, in confirmation of the previous agreements, that the balance of your accounts shall be administered by the writer as the trustee, and eventually by the undersigned in her absence, and that the securities fiduciary deposit existing with the Chemical Bank of New York, remains under the name of Adriana Bosurgi, who shall be answerable to your company for the same, according to previous agreements thereof." (A 420-21).

Further confirmation was had by letters dated July 12, 1962, August 1, 1962, and December 20, 1962. (A 422-27).

Judge Duffy, in his opinion below, noted:

> "The State court found that the money on deposit with Chemical Bank was held by the Bosurgis for the benefit of SAICI. That decision was based on documentary evidence submitted by SAICI on its motion for summary judgment. Ginsberg, on behalf of the Bosurgis, admitted that the documents were genuine. They consisted of a trust instrument signed in 1954, which indicated that the Bosurgis were to maintain an account in New York for the benefit of SAICI and various pieces of correspondence dated between 1955 and 1962 from the Bosurgis to SAICI in which the Bosurgis acknowledged that the New York account was held for SAICI's benefit." (389 F. Supp. at p. 1092; A 485).

Government counsel contend that no weight should have been given, either by the Appellate Division of the State Supreme Court or by Judge Duffy, to the concession of Mr. Ginsberg,

counsel for the Bosurgis, that the documents relied on by SAICI were genuine and authentic. It must be borne in mind that the Assistant United States Attorney, Michael I. Saltzman, had a copy of the SAICI complaint, proposed order of attachment, the affidavits and copies of the identical documentary proof and exhibits relied on, as far back as June 16, 1971 (p. 11, supra; A 225). So too did counsel for the Bank (A 225); also Government counsel Leon Hart, Esq., at the Appellate Division of IRS, received two copies of our motion papers for summary judgment, embodying the identical documentary proof on October 20, 1972, before our appeal from Justice Kapelman's order denying said application was perfected and argued (pp. 22-3, supra; A 237-8; A 243).

Although as Judge Duffy noted in his opinion below (A 485-6) that "[w]hile the Government quibbles about the authenticity of the evidence before the State Court, five members of the Appellate Division of the New York Supreme Court found it sufficient to order the State trial court to enter summary judgment on SAICI's behalf", especially since the Government "fails to offer any convincing evidence" that controverts the documentary proof submitted so long ago to all concerned (389 F. Supp. at p. 1092; A 486-7).

Moreover, as the record shows, counsel for the Bosurgis, Mr. Ginsberg, is a reputable and responsible lawyer,

who was then "presently serving on the Grievance Committee of the Association of the Bar of the City of New York and for many years has served on the Judiciary Committee" thereof (A 242). Furthermore, there was nothing in the record before the New York State Appellate Division which suggested, nor was there "a scintilla of fact presented throughout the intervening years upon the basis of which the [Mr. Ginsberg's] concession as to 'the genuiness and authenticity of the documents' upon which summary judgment was granted" could be challenged (A 242-3).

Government counsel, as we have shown, succeeded in having Justice Kapelman deny our summary judgment application because "[t]he Government alleges without evidentiary proof that the Bosurgi brothers controlled Sociedad [SAICI]" (A 244). It was upon the same basis that Government counsel unsuccessfully endeavored to have the New York State Appellate Division and Judge Duffy in the court below, reject the unchallengeable and unchallenged documentary proof that was in possession of the Assistant United States Attorney and Government counsel at the Appellate Division of IRS throughout these many years (A 243-4). In the same connection, it is noteworthy that in response to the unsubstantiated allegation of Government counsel which Justice Kapelman accepted "without evidentiary proof" that SAICI was controlled by the Bosurgi brothers, we sent to Assistant United States Attorney Michael I. Saltzman

on November 24, 1971, a photostat of a document we received that was attested before a notary public, with a translation thereof certified by the American Vice Consul at Montevideo, Uruguay, in which it was stated that:

> "(a) Drs. Emilio and Leone Bosurgi and the deceased Mrs. Adriana Caneva Bosurgi were not founders of S.A.I.C.I. (Commercial and Industrial Investments Corporation); (b) That they have not attended any meeting of the Society; and (c) That they have never occupied any office of director, nor they have discharged any executive office within the Society neither direct or through legal attorneys." (A 236)

Thereafter, on December 15, 1972, after a conference with Leon Hart, Esq., in charge at the Appellate Division of IRS, in a further communication to him, we specifically referred to the foregoing document and made mention of the fact that we had requested "in the same spirit of candor" that Government counsel submit to us a copy of any document contrary to the foregoing or let us know the source and nature thereof so that we in turn could promptly check its accuracy; we then readily acknowledged "that the Government has much better facilities and avenues of investigatory approach" and hence we "would welcome any advice received as to the authenticity of the information that as aforesaid was supplied to us" (A 243-4). As the record here shows, nothing whatever was heard from either branch of the Government or counsel throughout all of these years (A 244).

As to counsel's concession made after consultation with his clients (A 459-60) concerning the authenticity of the SAICI documentation (A 428-30), we need but add, it is settled law that "admissions of fact by counsel" are "binding on the party whom he represents" (Ferroline Corp. v. General Aniline & Film Corp., 207 F. 2d 912, 916-7, 7 Cir. 1953, cert. den. 347 U.S. 953, 98 L. Ed. 1098). Oscanyan v. W. R. Arms Co., 103 U.S. 261, 26 L. Ed. 539 is particularly apt. The unanimous opinion, after declaring that "[t]he power of the court to act in the disposition of a trial upon facts conceded by counsel, is as plain as its power to act upon the evidence produced" then states:

> "In the trial of a cause, the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. Indeed, any fact bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure, equally as if established by the clearest proof; and if, in the progress of a trial, either by such admission or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion or that of counsel, act upon it and close the case." (p. 263)

(b) The State Court decree of Mr. Justice Kapelman is not a consent decree or a default judgment and was justly treated with proper regard by Judge Duffy.

Judge Duffy correctly ruled:

> "Although the United States was fully aware of the State court proceedings and informally participated therein, it was not a formal party therein. In somewhat similar circumstances the United States Supreme Court has indicated that 'when the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should. . . not be controlling.' Commissioner v. Estate of Bosch, 387 U.S. 456, 465, 87 S. Ct. 1776, 1782, 18 L. Ed. 2d 886 (1967). The Court held that in such circumstances a federal court should give 'proper regard' to the rulings of the State court. It concluded that such an approach 'would be fair to the taxpayer and protect the federal revenue as well.' 387 U.S. at 465, 87 S.Ct. at 1783." (389 F. Supp. 1090-1; A 482).

Further illustrative of the consideration required by Bosch above cited and quoted, is the opinion of Friendly, J., in Cheng Yih-Chun v. Federal Reserve Bank of New York, 2d Cir., 442 F 2d 460 (1971), likewise relied on in the opinion below (p. 1091), in which plaintiff urged that the New York Surrogate's Court was empowered to determine ownership of estate property found within its jurisdiction and hence its determination of that issue was binding upon the Secretary of the Treasury in a subsequent federal litigation. It will be noted from the following how strikingly parallel was the situation then before this Court, except that the very opposite facts to

those established here were presented:

> "Since the Secretary was not a party to the Surrogate's proceeding and, indeed, had not even been given notice of it or invited to present his views, principles of res judicata and collateral estoppel do not preclude him from contesting the Surrogate's ruling in subsequent federal litigation. Nevertheless, loudly invoking the principles of an orderly federal-state relationship and asserting that a federal district court has neither original nor appellate jurisdiction over the administration of a New York estate, Cheng contends the federal court should have respected the Surrogate's decision. The Secretary, for his part, piously defends Judge Wyatt's decision to disregard the Surrogate's determination; yet neither in the district court nor in his brief on appeal did he cite the one case that is controlling in his favor." (p. 463)

The opinion continues with this reference to Bosch:

> "That case, C.I.R. v. Estate of Bosch, 387 U.S. 456, 87 S.Ct. 1776, 18 L. Ed. 2d 886 (1967), presented the question 'Whether a federal court or agency in a federal estate tax controversy is conclusively bound by a state trial court adjudication of property rights or characterization of property interests when the United States is not made a party to such proceeding.' Id. at 456-457, 87 S. Ct. at 1778. The answer was as follows: 'If there be no decision by [the state's highest court on a state law issue arising in federal litigation] then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State.' Id. at 465, 87 S. Ct. at 1783-and this even though an adversary had opposed the application resulting in the lower state court's ruling." (p. 463)

On this aspect the opinion then concludes:

> "Applying Bosch to our case, Judge Wyatt was not concluded by Surrogate DiFalco's determination of the effect of the April, 1950 Power of Attorney but was bound to consider, after giving 'proper regard' to the Surrogate's decision, whether the law of New York was otherwise. As a reading of the Power of Attorney, set forth in the margin, discloses, the judge was altogether correct in deciding-contrary to the Surrogate's unexplained ruling-that New York would not recognize such a document as transferring to the appointee the beneficial interest of the appointing parties. Cf. In re Katz' Estate, 152 Misc. 757, 274 N.Y.S. 202 (Surr. Ct. Kings County 1934); Gaughan v. Nickoloff, 28 Misc. 2d 555, 214 N.Y.S.2d 487 Sup. Ct. Erie County 1961). See generally 2 N.Y. Jurisprudence: Agency §§ 64-73 (1958)" (pp. 463-4)

It is illuminating to refer to footnote 3 in which Judge Friendly states:

> "3. In light of the entire clarity of the documents there was no error in deciding the issue on a motion for summary judgment." (p. 464)

So here, in view of the entire clarity of the documentary record, there was no error in deciding the issues presented by summary judgment.

The unsubstantiated and discreditable charge of "collusion" as we indicated below, was belatedly asserted in pursuit of the same strategy initially resorted to before Mr. Justice Kapelman, whereby Government counsel made allegations "without evidentiary proof" in support thereof (p. 21,

supra; A 238-44; A 249; A 181). Judge Duffy, in the opinion below held that:

> "If the government seriously desires to suggest collusion, it must produce some evidence to that effect. Flitcroft v. Commissioner, 328 F. 2d 449, 454 (9th Cir. 1964). It has failed to do so here. Indeed, in discussing the factors to be considered in determining whether there was collusion in the State court proceedings involved in Flitcroft, two of the factors listed by the Ninth Circuit were 'whether the federal tax authorities have notice of the state court action; and whether the state court reached the correct result.' 328 F. 2d at 455. I will discuss the latter issue in part II, but as to the question of notice, the United States certainly had notice of the State court proceedings in this case; the parties in the State court seemed anxious to have the government join in that proceeding. I conclude that the State court proceedings were not collusive." (389 F. Supp. at p. 1091; A 483-4)

We agree with the determination in Flitcroft that there can be "no dissent from the rule that a 'collusive' judgment of a state court is not binding on the federal courts in determining tax liability" and readily acknowledge that it is difficult "to reconcile all of the decisions which have determined whether particular judgments were 'consent decrees'." Admittedly "[m]any factors must be considered in determining whether a judgment is in fact collusive, and ignoring particular factors has resulted in apparently conflicting decisions." (Flitcroft v. C.I.R., 9 Cir., 328 F 2d 449 [1964]) In Flitcroft, the

unanimous opinion pertinently noted:

> "The mere fact that the action instituted by the trustees was not resisted by the trustors, and was to that extent a 'consent' decree, does not in itself make the decree collusive. It is one factor to be considered. Other factors include (1) the nature of the right determined by the state court; (2) whether the federal tax authorities have notice of the state court action; and (3) whether the state court reached the correct result." (p. 455)

In the case at bar, as we have demonstrated, the state court decree of Mr. Justice Kapelman was in no sense a "consent" decree. It was rendered pursuant to the unanimous determination of the Appellate Division in an adversary proceeding which held, to use the foregoing format (1) that title to the settlement proceeds belong to SAICI; (2) the federal authorities, the United States Attorney and counsel for the Appellate Division of IRS had notice of the state court action and proceedings and were furnished with the full record presented to the Court on the summary judgment application there made; and (3) here no doubt can exist but that the Appellate Division reached a correct conclusion.

The opinion in Flitcroft cites and quotes from a pertinent decision of the Tax Court which held that it was bound by a Texas state court determination, although it was recognized that "where the state court judgment is obtained through 'collusion' for the purpose of avoiding tax liability, it has no binding

effect on the Commissioner." Flitcroft then pertinently quotes the following from the Tax Court's opinion:

> "Since the law presumes that court proceedings are regular and valid, we think in a situation like this, where 'collusion' is asserted by respondent, it is incumbent upon him to produce at least some evidence to that effect. But here he has not done so. He merely urges us to find that there was 'no necessity or reason for the state court judgment except for its effect on the Federal tax question, and all of the parties to the state court action were undoubtedly aware of the position that respondent was going to take.' This alone, in our opinion, is insufficient to give the State Court proceeding a collusive, non-adversary character. Nor was it less adversary because the statutory notice of deficiency was issued prior to the State Court judgment. Obviously, it was to avoid the possibility of respondent charging that silence is evidence of clandestine collusion that the Government was invited on March 14, 1962, to either intervene or otherwise assist in the State Court action." (Flitcroft, p. 454)

This record here, we submit, precludes the possibility of characterizing the State Court litigations or the proceedings therein as being of a "non-adversary character." Here too, government counsel was invited to intervene in the State Court proceedings and in fact did intervene although "not formally a party". Indeed, Assistant United States Attorney Michael I. Saltzman, Esq., in his brief submitted to sustain service of process on SAICI in this action asserted that "[t]he Society [SAICI] named as parties defendant the Bosurgis and the custodian appointed by this [federal] Court"

and "that since the Society [SAICI] named the custodian, it implicitly named the Government and all other claimants to the fund held by the custodian." In a footnote to the last statement, Mr. Saltzman asserted:

> "If the claimants were not implicitly named, then the Society [SAICI], it must be conceded, failed to name necessary parties. (C.P.L.R. 1001(a)."

Further indicative of the scope of Bosch is Miglionico v. U.S., 323 F. Supp. 197 (1971), also cited in the opinion below (389 F. Supp. at pp. 1091-2), which held:

> "The finding and decree of this state court, while not conclusive [Com'r of Internal Revenue v. Estate of Bosch, 387 U.S. 456, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967)], is entitled nevertheless to appropriate recognition and weight by this court since it did indeed determine property rights between parties with adverse interests and was not collusively brought or maintained. That it lacked the type of antagonism which in a factious family might have resulted in bitter appeals to the appellate courts of the state is a matter which goes to the weight of those findings to the case at bar. There was substantial evidence before the Probate Court on which it could have found that Mrs. Johns had no beneficial interest. Finding itself in accord with the conclusions reached in the state court proceedings, this court is a fortiori not prepared to challenge the state court's findings of those facts. Cf. Lakewood Plantation, Inc. v. United States, 272 F.Supp. 290 (D.S.C. 1967). Also see First Nat'l Bank of Amarillo v. United States, 422 F.2d 1385 (10th Cir. 1970)" (p. 200).

In his footnote to the foregoing authority, Judge Duffy stated:

> "6. In its argument that this Court should ignore the State court proceedings, the government suggests that the State court could not act because of this Court's order of March 18, 1971. I disagree. That order simply directed Ginsberg to hold the fund in escrow until further order of this Court. The order in no way indicated that the then pending State court proceedings should be stayed. The New York courts could and did determine which of the parties before it was the owner of the account at Chemical Bank. The United States is not bound by that decision in this proceeding, but I will give proper regard to the State court decision pursuant to Bosch." (389 F. Supp. at p. 1092; A 490).

The opinion below moreover rejected the contention that the state court judgment ultimately entered pursuant to the Appellate Division determination was "a default judgment":

> "In determining the proper regard to be given the State court proceedings in this particular case, I note that the judgment entered was not a default judgment, but rather was entered on the basis of a motion for summary judgment. Furthermore, I do not believe that the State court proceedings were in any way collusive as has been suggested by the United States." (389 F. Supp. at p. 1091; A 482-3)

The Government's brief, in constantly replaying a contrary theme, refers (p. 51) to "the uncontested motion by SAICI to recover the $215,000.00 fund and the uncontested motion by Ginsberg to be awarded a fee out of the fund." Yet, as already noted, "the United States does not contest the

lien priority of Ginsberg, but only the amount thereof." (Gov't's br., p. 4). In the state court proceedings, we successfully contested the binding force upon SAICI of Mr. Ginsberg's retainer; we challenged the validity of having that issue determined by arbitration, and succeeded in bringing about a substantial reduction in the allowance from that fixed in the written retainer (pp. 17, 23-4, supra).

There was no default judgment in the SAICI suit. The concession of Bosurgi's counsel as to the authenticity of the basic documentary exhibits relied on by SAICI did not have that legal effect (p. 36, supra). Moreover, copies of the controlling exhibits relied on by SAICI were long ago in the possession of U.S. counsel in divers branches of the Government, also in the possession of counsel for the Bank, and as the record shows:

> "It bears emphasis to state that throughout all of these intervening years and up to the present time, not a shred of evidence has been presented which, in the slightest degree, challenges the genuiness and authenticity of the documents upon which summary judgment was granted." (A 256)

Government counsel could have intervened at the very inception of SAICI's case in the New York State Supreme Court, as we expressly requested (pp. 11-12, supra). There was no reason

for apprehension on the part of Government counsel as to Mr. Justice Kapelman proceeding with the finalization of the tentative settlement before him and from ultimately determining the conflicting issues raised in respect thereof, since as we respectfully state, he countenanced, albeit erroneously, the strategy pursued by Government counsel (p. 21, supra).

The fund and securities constituting the settlement proceeds did not mature into a discernible and disposable res, until after the entry of final judgment in the state court action pursuant to the aforesaid Appellate Division decision and order. Such final judgment decreed the settlement fund to be the property of SAICI (pp. 24-5, supra; A 261-2).

Moreover, the issue as to ownership of the settlement proceeds as we have demonstrated, did not involve the estate of Adriana Bosurgi or any estate rights, obligations or claims. The fund that evolved from the settlement thereof resulted from bona fide settlement negotiations in a bitterly contested case (pp. 2-5, supra). SAICI's action and proceedings were directed to that settlement fund and not to or against the estate of Adriana Bosurgi or any asset thereof.

The Bosurgis' personal tort action against the Bank was instituted in the New York State Supreme Court in

1966, long before there was even knowledge of the existence of the assertion of any estate tax claim allegedly stemming from their mother's estate (pp. 3-4, 7, supra). SAICI's actions and proceedings were begun at a time when admittedly there was but a "tentative settlement" and when admittedly that action was "still pending" and undetermined before Mr. Justice Kapelman (pp. 16-17, supra). SAICI's application for consolidation and summary judgment asserting its right to the settlement proceeds was grounded upon the claim of title to the block of stock which was the subject of the tortious conduct alleged against the Bank (pp. 16-18, supra).

The record establishes that neither the Bank nor the Bosurgis could validly oppose the documentary proof upon which SAICI's asserted claim was predicated (pp. 21, 30-36, supra). Moreover, as early as June 24, 1971, we alerted Government counsel (A 224, A 229) to Venitron Corp. et al. v. Benjamin, 440 F.2d 105, 1971, in which this Court held that "there is no reason why the state court cannot and should not determine issues of fact and state law relevant thereto as they come up in the state litigation", and it is not sufficient as a basis for restraint thereof "to show that the matter before a state court embraces issues within the compass of the federal suit even if the federal court has exclusive jurisdiction over its case" and more important, "the subsequent effect of collateral estoppel

far from requiring the federal court to stay proceedings in the state court, is a result which should be welcomed to avoid the task of reconsidering issues which have already been settled by another competent tribunal" (p.108).

Although as we have seen, Judge Duffy did not apply the doctrine of collateral estoppel, he did hold that "there is no reason not to give proper regard to the State court proceedings herein" and that the interests of "judicial economy are enhanced by allowing competent State tribunals to decide issues of State law," citing Klein v. Walston Co., 432 F.2d 936, 937 (2d Cir. 1970) (389 F.Supp. at p. 1091; A 484).

II. THE CURRENT TAX ASSESSMENTS AND LEVY MADE AGAINST SAICI FURTHER MANIFEST THE FRUSTRATION, FUTILITY AND INORDINATE DELAY ATTENDANT UPON EVERY EFFORT TO BRING THIS MATTER TO A CONCLUSION.

As Judge Duffy's opinion below indicates, admittedly "the income taxes paid on dividends paid into the [custodian] account were paid by Mrs. Bosurgi" (389 F.Supp. at p. 1092; A 485). The Government claimed below "that the income taxes on the account should have been paid at a rate of 30% rather than 15% actually paid if SAICI was the owner of the account" (id. p. 1092; A 485). Judge Duffy noted that the difference was

"attributable to the existence of a tax treaty with Italy, but not with Uruguay"* (id. p. 1092, note 9; A 491). The Government, as the opinion below sets forth, did "not offer any tax returns filed by Mrs. Bosurgi, but submits Chemical Bank's Form 10428 return, showing the name of the owner of the account, its income and the tax withheld" (389 F.Supp. at p. 1092, note 8; A 491). SAICI was not an Italian but a Uruguayan holding company (A 235-6; A 400; A 417; A 419; A 421; A 423; A 425; A 427). In any event, as above indicated, admittedly "no taxes have been assessed on the settlement income or on the interest received on the bank certificate of deposit."

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* On May 2, 1975, tax assessments and a notice of levy on SAICI were made and sent to Mr. Ginsberg, for alleged unpaid tax balances claimed to be due for each of the years ending December 31, 1954 through and including December 31, 1964, totalling $140,466.00. The name of the taxpayer is given as follows:

> "Sociodad Anomima de Inversiones
> Commerciales e Industriales
> Paraguay 1246
> Monte Video, Uruguay"

On July 1, 1975, we were advised by Paul Stuchlak, Revenue Officer of IRS, that:

> "The tax liability of SAICI is based on dividends earned from the custodian account with Chemical Bank. Such dividends are subject to income tax under Section 881(a) of the Internal Revenue Code. Although an assessment of this liability was made pursuant to the factual determination by the District Court that the funds in the custodian account at Chemical Bank belonged to SAICI, this assessment has no effect on the United States' decision concerning an appeal of United States of America v. Leone Bosurgi, et al. (71 Civ. 928, S.D.N.Y.).
>
> No taxes have been assessed on the settlement income or on the interest received on the bank certificate of deposit."

The settlement proceeds, as we have seen, evolved from the Bosurgi lawsuit for money damages allegedly caused by the fraud and conversion which as aforesaid, had admittedly reduced the custodian account to zero (pp. 3-4, supra). Accordingly, there is demonstrably no basis for any tax claim or levy against SAICI, certainly not in excess of the taxes withheld as aforesaid, and this assuming that no tax credit resulted from the tortious conduct which completely decimated the securities in the custodian account.

III. THE DETERMINATION MADE BELOW AS TO SAICI SHOULD BE IN ALL RESPECTS AFFIRMED.

Since Judge Duffy's further order of June 3, 1975 provides that Mr. Ginsberg continue to hold the fund in escrow upon the same conditions and provisions specified in Judge Bonsal's order of March 18, 1971 (A 496), that he had theretofore vacated (A 488), appropriate application must be made thereunder following the determination by this Court.

Respectfully submitted,
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